United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,419

LAWRENCE E. STATON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

374

Appeal from Judgment of
The United States District Court
for the District of Columbia

Smith W. Brookhart
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Washington, D. C. 20006

Attorney for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court commit plain error in giving instructions that so extensively treat with satisfying reasonable doubts and so minimally treat with presumption of innocence as to deny appellant a fair trial?

II. Did the Court's instruction on the lesser included offense of simple assault under Count II constitute a prejudicial admonition to find appellant quilty of simple assault and exclude a verdict of not guilty, thereby denying appellant a fair trial?

III. Was the Court's instruction as to the interest of the Government and society in the prosecution fatally prejudiced in the absence of instruction that society and the Government are equally interested in preserving and protecting the rights of an accused under the Constitution and laws which presume an accused to be innocent until proven guilty in accordance with due process?

IV. Was the Court's instruction regarding Count I prejudicial in citing a felonious conspiracy case as an example of aiding and abetting when no analogy is presented by the evidence introduced against the appellant?

I N D E X

TABLE OF AUTHORITIES

Cases:

Constitution, Statute, Rule:

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*Cases chiefly relief upon

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAWRENCE E. STATON, No. 20,419,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of
The United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

I.

JURISDICTIONAL STATEMENT

An indictment for robbery, assault with intent to commit robbery, and assault on a member of the Metropolitan Police Force, under §§22-2901, 501 and 505(a), respectively of the District of Columbia Code (1961 Ed.), was returned against appellant on November 1, 1965. Appellant pleaded not guilty on November 12, 1965. Appellant was tried by a jury on May 10 and 11, 1966, and was found guilty as charged in Counts I and III and guilty of simple assault as a lesser included offense under Count II of the indictment.

On June 30, 1966, appellant was sentenced 2 to 8 years under Count I, for robbery; 1 year under Count II, for the lesser included offense of simple assault; and 1 to 3 years under Count III for assault on a police officer, such sentences to run concurrently. Appeal bond was set at $5,000.00. Appellant has remained in jail.

Appellant filed a timely notice of appeal from the judgment of conviction below and was permitted to proceed on appeal in forma pauperis by order of the District Court filed August 15, 1966.

This Court has jurisdiction of this appeal under 28 USC §1291.

II.

STATEMENT OF THE CASE

A. The Nature of the Case

The indictment contains three counts, each alleging that the offense took place on September 11, 1965. The first count charges appellant with taking a wallet worth $3.00 and containing $13.00, from Sandra J. Richmond by force and violence in violation of §22-2901, D.C. Code. The second count charges appellant with assaulting Mary L. Bailey with intent to rob in violation of §22-501 of the D.C. Code. The third count charges appellant with assault on Michael A. Bello, Jr., a member of the Metropolitan Police Department in violation of §22-505(a) of the D.C. Code. On November 12, 1965, appellant entered his plea of not guilty to each count. Appellant was taken into custody without a warrant.

The trial took place on May 10, 1966. The jury returned May 11, 1966, to give their verdict. The jury found the appellant guilty as charged in Counts I and III of the indictment and guilty of a lesser included offense under Count II. Judgment was entered on such convictions.

B. Facts of the Case

1. The Alleged Occurrences

About 11:30 PM on September 11, 1965, Sandra Joann Richmond, her sister, Marian Jennette Smith, and a friend, Mary L. Bailey, left the residence of the first two at 1661 Park Road, N.W., and walked west on the north side of Park Road to 17th Street. While waiting for the traffic light to change, they were surrounded by a group of five boys (Tr. 3, 5, 18, 32 and 39). One of the boys grabbed Mary Bailey's pocketbook and as Sandra Richmond swung around to get out of the way, she wound up with Mary Bailey's pocketbook on her arm. Another boy opened Sandra Richmond's pocketbook and took a wallet which contained about $17.00 (Tr. 5, 6, 8 and 10). Mary Bailey was slapped three times about the face by one of the boys, later identified by Sandra Richmond as the appellant (Tr. 9). Mary Bailey fell into the street. All of the boys ran around the corner and down 17th Street toward downtown. The girls reported to a police officer who came by in a minute or two. He then placed a call from a call box down the street (Tr. 11, 19), returning a few minutes later. About 15 minutes later, Officer Michael A. Bello, Jr., and another officer, both in plain clothes, arrived in Officer Bello's private station wagon (Tr. 11,

12 and 66). They took Sandra Richmond and Marian Smith cruising to look for the boys (Tr. 12, 20). A block and a half or two blocks away (Tr. 12, 22 and 48), Sandra Richmond saw appellant and another boy standing in front of a house. She identified appellant as the one who slapped Mary Bailey and the other boy as "the guy who took my wallet" (Tr. 12, 13, 28, 39 and 46). The two police officers arrested appellant and the other boy (whose identity was never established in the record) and put them in the front seat of the station wagon. Officer Bello occupied the driver's seat and the other officer sat in the back seat, behind appellant, along with the two girls (Tr. 13). Appellant asked why they were being arrested and was told to "sit down and be quiet and not make any noise" (Tr. 14), or "shut up and keep quiet" (Tr. 87). Before the car had traveled very far appellant and the other boy jumped out of the car and fled, the car door hitting Officer Bello as he came around from the front of the car to head them off. (Tr. 14, 45, 46, 62, 87 and 88). Officer Bello chased appellant and the other officer chased the other unidentified boy, who was never seen thereafter. Officer Bello estimated his chase was for at least eight blocks. At 16th and Newton, he fired two shots, because "I knew he was escaping, the felon was leaving, I knew I couldn't get him. I opened up and fired two rounds. Neither shot took effect" (Tr. 73). Witness Sandra Richmond heard two shots after "they had gone around the corner" (Tr. 26). Appellant heard the shots about a block after he left the station wagon and he then turned in the alley, ending up at 14th and Newton Streets (Tr. 88, 89). At 14th

and Monroe, appellant was arrested by Officer William M. Gerke, in uniform and in a marked police car. Appellant was then identified by Sandra Richmond and Mary Bailey (Tr. 90-91).

2. Defense Testimony

Appellant resides at 625 L Street, N. E., with his mother. He had dropped in at an informal party at the home of a friend, Melvin Yates, at 1724 - 17th Street, attended by Mrs. Yates and her friends, about 9:30 PM (Tr. 83, 94-97). About 11:30, he went outside and was standing around talking to Melvin Yates and others when Officer Bello got out of a car and grabbed him for no reason (Tr. 101-102) and put him in the back seat of the station wagon, with the two girls (Tr. 108, 109). Appellant asserts the first time he saw the two girls on the night of September 11, 1965, was when Officer Bello arrested him in front of the party he was attending and put him in the back seat of the station wagon (Tr. 111).

III.

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES INVOLVED

United States Constitution

Amendment V

"No person shall *** be deprived of life, liberty or property, without due process of law ***."

Rule 52(b), Federal Rules of Criminal Procedure

"(b). Plain Error. Plain errors or defects affecting substantial rights may be noticed, although there were not brought to the attention of the Court.

D. C. Code

Sec. 22-501

Sec. 22-505(a)

Sec. 22-2901

IV.

STATEMENT OF POINTS

1. The court below erred in its instructions by making but an early interstitial reference to the presumption of every defendant's innocence in otherwise lengthy instructions dealing with probable cause, burden of proof and the elements of the offenses charged.

2. The Court below erred in its instructions by analogizing the case with a planned bank robbery when there was no evidence of appellant's having acted in concert, and testimony of government witnesses established that he was not involved in robbery.

3. The Court below erred in its instructions as to Count II that the jury could acquit or convict the appellant under the charge of assault to commit robbery "or you may convict him of simple assault".

V.

SUMMARY OF ARGUMENT

1. Appellant seeks reversal of the judgment of conviction under Rule 52(b) of the Federal Rules of Criminal Procedure on the basis of plain error committed in its instructions to the jury.

2. Appellant failed to receive a fair trial due to prejudicial instructions of the court. The lengthy instructions unduly weighed against finding for the accused by using unfair analogy to a planned bank robber and by virtually dictating a verdict of simple assault. The use of the example of robbery was clearly prejudicial, in the face of the Government's failure to prove appellant's participation in a robbery or intent to commit robbery.

3. Appellant's right to a fair trial was fatally prejudiced by the Court's minimal instruction as to the presumption of innocence which remains with an accused throughout a trial. Being preceded by instruction that the people of the United States and Society have an interest in the prosecution of all criminal cases and followed at the closing by citation of a duty to convict as to one or all three charges, the allusion to presumption of innocence was effectively diluted.

VI.

ARGUMENT

1. THE COURT BELOW ERRED IN ITS INSTRUCTIONS BY MAKING BUT AN EARLY INTERSTITIAL REFERENCE TO THE PRESUMPTION OF EVERY DEFENDANT'S INNOCENCE IN OTHERWISE LENGTHY INSTRUCTIONS DEALING WITH PROBABLE CAUSE, BURDEN OF PROOF AND THE ELEMENTS OF THE OFFENSES CHARGED.

With respect to Point 1, appellant desires the court to read the Instructions to the Jury, Tr. 117-139. Instructions to the jury cover twenty-four pages. One four-and-one-half line comment early in the instructions (Tr. 120, lines 12-16) was the only reference to the presumption of innocence of the defendant. Twenty pages later (Tr. 140, lines 4-8), the court excluded any finding other than guilty of simple assault. When the instruction on presumption of innocence of a defendant is qualified, it leaves matters about where they would have been had no instruction on the presumption been given. Reynolds v. U.S., 238 F.2d 460 (1956).

Erroneous instructions affecting the substantial rights of the defendant are grounds for evoking the "plain error" Rule 52(b), F.R. Crim. P., Findley v. U.S., 362 F.2d 921 (1966). Plain error or defects affecting "substantial rights" may be noticed on appeal though they were not brought to the attention of the trial court, Tatum v. U.S., 190 F.2d 612 (1951). If the jury is inadvertently led to believe that the judge does not regard the presumption [of innocence], they may also disregard it, Gomila v. U.S., 146 F.2d 372 (1944). Presumption of innocence is predicated not upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the common law.

2. THE COURT BELOW ERRED IN ITS INSTRUCTIONS BY ANALOGIZING THE CASE WITH A PLANNED BANK ROBBERY WHEN THERE WAS NO EVIDENCE OF APPELLANT'S HAVING ACTED IN CONCERT, AND TESTIMONY OF GOVERNMENT WITNESSES ESTABLISHED THAT HE WAS NOT INVOLVED IN ROBBERY.

With respect to Point 2, appellant desires the court to read Tr., last 4 lines of page 132, all of page 133, and first 16 lines of page 134.

In the absence of any evidence that appellant acted in concert with anyone and testimony that the robbery was committed by another person, the analogy to a planned bank robbery was highly prejudicial.

The court's disclaimer, Tr. 132, that the hypothetical set of facts "is not related by any ways to this case" cannot save the prejudicial effect of setting out such an organized crime as an example for the jury to consider. Although no exception was taken by appellant to the charge when it was given, it is the duty of an appellate court to correct any error prejudicial to him. Kinard v. U.S., 68 App. D.C. 250, 96 F.2d 522.

See also Payton v. U.S., 96 App. D.C. 1; 222 F.2d 794; and Pinkard v. U.S., 99 App. D.C. 394; 240 F.2d 635.

3. THE COURT BELOW ERRED IN ITS INSTRUCTIONS AS TO COUNT II THAT THE JURY COULD ACQUIT OR CONVICT THE APPELLANT UNDER THE CHARGE OF ASSAULT TO COMMIT ROBBERY "OR YOU MAY CONVICT HIM OF SIMPLE ASSAULT".

With respect to Point 3, appellant desires the court to read Tr. 140, the sentence beginning the middle of line 4, and the

remainder of paragraph and to reconsider the sentence commencing on page 117 and through the first paragraph on page 118. The instruction on page 140 virtually ordered the jury to find the appellant guilty of simple assault. This was made more prejudicial by the instruction previously given of a hypothetical planned and armed bank robbery to establish a definition of aiding and abetting (Tr. 132-135). The naked assertion, "Those are the three possible verdicts...either guilty or not guilty, or guilty of simple assault" (Tr. 140, lines 7-8), under Count II, left no room for doubt that a guilty of simple assault verdict was expected.

These specific instructions, coupled with the opening emphasis upon the interest of the United States in the prosecution (Tr. 117-118) without commensurate emphasis on the interest of the Government in protecting and preserving the rights of accused under the Constitution denied appellant a fair trial. A fair and impartial trial is guaranteed to every defendant. Gomila v. U.S., supra.

VII.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of conviction of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

(S)

Smith W. Brookhart
1700 K Street, N. W.
Washington, D. C. 20006

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief were personally served upon David G. Bress, Esquire, attorney for appellee, at his office, United States Court House, Washington, D. C., this 15th day of October, 1966.

Smith W. Brookhart

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,419

LAWRENCE E. STATON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

Cr. No. 1204-65

QUESTION PRESENTED

In the opinion of appellee, the following question is presented:

Did the trial court commit plain error affecting substantial rights in a robbery and assault case, where the evidence of guilt on three counts was convincing, no objection whatever to the instructions was made, and the court

(1) gave a correct instruction on the presumption of innocence,
(2) used a hypothetical example to clarify its aiding and abetting instruction,
(3) instructed that the jury might return a guilty verdict on a lesser included offense, and
(4) referred to the interest of the United States in a criminal case?

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was tried before Judge Sirica and a jury in May 1966 and found guilty of robbery, simple assault, and assault on a police officer (22 D.C. Code § 2901, 504, 505(a)). The court imposed concurrent sentences of two to eight years, one year, and one to three years, respectively.

The Government's case was presented through three young women and two police officers. Two of the women, Sandra J. Richmond and Mrs. Marian J. Smith, who were sisters, met Mary L. Bailey at their house at 1661 Park Road, N.W., in the evening of September 11, 1965 (Tr.

3-4, 31, 38-39). The three left to go to a party about 11:30 P.M. but, having gone only a few steps to the corner of 17th Street and Park Road, were surrounded and attacked by a group of about five negro males who had approached from behind (Tr. 5, 18, 32, 39). One, identified by Miss Richmond as appellant, grabbed for Miss Bailey's pocketbook, and slapped Miss Bailey several times in the face (Tr. 5-7, 9). Mrs. Smith was also able to identify appellant as the one who had slapped Miss Bailey, although Miss Bailey did not get an opportunity to see who slapped her (Tr. 32-33, 36, 39-40). Miss Bailey was knocked into the street and her pocketbook somehow swung onto the arm of Miss Richmond (Tr. 6, 33-35, 40-42). Another of the group of men took Miss Richmond's wallet containing $17 from her (Tr. 7-8, 10, 16, 42). The men all ran off in the same direction and the women contacted a police officer down the street (Tr. 11, 19, 42-43).

Within minutes plainclothes Officer Bello and his partner arrived in an unmarked car (Tr. 11-12, 20, 43, 58-59, 66). They picked up Miss Richmond and Mrs. Smith and cruised in the direction the men had disappeared (Tr. 12, 43-44, 59, 61). From the car the women identified appellant and the man who took Miss Richmond's wallet standing in front of a house a few blocks away in the 3300 block of Newton Street, N.W. (Tr. 12, 22, 44, 47, 53, 59-60, 67). Officer Bello stopped the car, got out and identified himself to the two men, and placed them under arrest and in the car (Tr. 14, 23-25, 44, 54, 59-60, 67). When the car started up, both men jumped out and ran (Tr. 14-15, 45-46, 55-56, 61-62, 69). Officer Bello was knocked down as appellant swung the car door outward against him (Tr. 14, 46, 55, 62, 69). Appellant was chased about eight blocks by Officer Bello who, when about to lose him, fired two shots at him without effect (Tr. 15, 62, 73). Appellant, puffing and out of breath, was arrested by Officer Gerke within a few minutes at 14th and Newton Streets, N.W., on the basis of a lookout (Tr. 75-76, 78). The Government witnesses except Miss Bailey were able

to identify a cream-colored cap and a striped sweater introduced in evidence as similar to those worn by appellant during and after the robbery but removed and carried by him before his arrest by Officer Gerke (Tr. 8-9, 15-16, 27, 29, 36, 41, 60, 70, 76-77).

Appellant took the stand in his own behalf. He admitted his identity as the man who had been put in Officer Bello's car and chased when he escaped (Tr. 84, 87-89). But he claimed to have spent the evening at a party at the place where he was arrested, and that he had never seen the women before being put in the car (Tr. 83-85, 94, 111-112). He offered no alibi witnesses (Tr. 109-110). He said Officer Bello had not identified himself as a police officer or explained why he was being put in the car, and he in effect denied pushing the car door against Officer Bello (Tr. 88). Appellant admitted wearing and then taking off the items of clothing introduced in evidence (Tr. 89-90, 101).

Following brief rebuttal by the Government, the court asked for instructions (Tr. 113). At a bench conference appellant neither offered nor requested instructions and objected to none suggested by the court (Tr. 113-116). The court gave instructions among others on the presumption of innocence, aiding and abetting, the "mere presence rule," and a lesser included offense (Tr. 120-121; 125, 131-134; 135-136; 128, 140). Appellant at the conclusion of the instructions stated he had no objection and indicated he was satisfied (Tr. 141-142).

STATUTES INVOLVED

Title 22, District of Columbia Code, § 504, provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

Title 22, District of Columbia Code, § 505(a), provides:

> (a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates,

or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both.

Title 22, District of Columbia Code, § 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT AND ARGUMENT

The trial court did not commit plain error in its charge to the jury.

(Tr. 113-142)

Appellant now complains that the trial court improperly instructed the jury by (1) underemphasizing the presumption of innocence, (2) using a hypothetical example to clarify the aiding and abetting instruction, (3) instructing that the jury might return a guilty verdict on a lesser included offense, and (4) referring to the interest of the United States in the case. At no time, however, did appellant object to the court's charges, or otherwise inform the trial judge of his discontent so as to give the court an opportunity to amplify the charges or rectify any errors. Evidence of guilt was convincing. Accordingly, appellant should be barred from obtaining reversal on this ground. F.R.Crim.P. 30; *Kelly* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 61 (1966); *Pitts* v. *United States*, 99 U.S. App. D.C. 63, 237 F.2d 217 (1956); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 241-242, 184 F.2d 261, 262-263 (1950); *cf. Rivera* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 553, *cert. denied*, —— U.S. —— (Nov. 7, 1966).

The court's instruction on the presumption of innocence fully and adequately covered the elements required in this Circuit.[1] *McAffee* v. *United States*, 70 U.S. App. D.C. 142, 151, 105 F.2d 21, 30 (1939); see *Jones* v. *United States*, 113 U.S. App. D.C. 233, 234, 307 F.2d 190, 191 (1962). Appellant's thesis that the instruction was somehow qualified is erroneous.[2] Rather, the instruction was complemented by the remainder of the charge.[3] Appellant's mere quantitative analysis is not a helpful ap-

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[1] The instruction, in pertinent part, was as follows:

> Now the law is every defendant is presumed to be innocent of the charge or charges contained in the indictment, and this presumption remains with him throughout the entire trial and until such time as each and everyone of you are satisfied of his guilt beyond a reasonable doubt.
>
> The burden of proof is upon the Government to prove him guilty to your satisfaction, as I said, beyond a reasonable doubt. . . .
>
> * * * *
>
> . . . . [T]he defendant, of course, is not required to establish his innocence under our system of jurisprudence.
>
> (Tr. 120-121.)

[2] That line of cases from other jurisdictions relied on by appellant is sharply distinguishable. Those cases find the presumption erroneously qualified where it is stated in a way which might cause the jury to infer that its application depends upon a defendant's innocence. *Reynolds* v. *United States*, 238 F.2d 460 (9th Cir. 1956); *Gomila* v. *United States*, 146 F.2d 372, 373 (5th Cir. 1944). Compare *Shaw* v. *United States*, 244 F.2d 930, 938-939 (9th Cir. 1957); *Farima* v. *United States*, 184 F.2d 18, 20-21 (2nd Cir.), *cert. denied*, 340 U.S. 875 (1950); *Moffitt* v. *United States*, 154 F.2d 402, 404-405 (10th Cir.), *cert. denied*, 328 U.S. 853 (1946). The present instruction totally lacks any such qualification.

[3] There is no contradiction, as appellant assumes, Br. (i), 7, 8, 9, between the instructions on presumption of innocence and the other instructions, particularly the instruction on reasonable doubt.

> "[I]t is to be noted that the 'presumption of innocence' is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, *i.e.*, the rule that it is for the prosecution to adduce evidence . . ., and to produce persuasion beyond a reasonable doubt . . . ."
> 9 Wigmore (3rd Ed. 1940) § 2511 at 407.

proach[4] and, contrary to the statement in Appellant's Brief at 9, the presumption was specifically referred to and reinforced at three points during the charge (Tr. 120, 121, 131).

Of course, "the trial judge may use assumed facts, not connected with the case and not proved, to illustrate a principle or rule of law, if the instruction is so framed as not to assume that these facts have been proved." 23A C.J.S. § 1166 at 442; 16 C.J. § 2331 at 953. The court's aiding and abetting instruction was proper[5] upon the evidence[6] and twice agreed to by appellant (Tr. 115-116, 141-142), and the hypothetical posed was an appropriate and useful method of illustration of the legal principle (Tr. 132-133). See *State* v. *Young*, 238 S.C. 115, 119 S.E.2d 504, 510, 514-515, *cert. denied*, 368 U.S. 868 (1961). Appellant cannot blithely ignore the fact that the hypothetical was carefully limited by the court,[7] sufficiently distinct so as to have been clearly understand-

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[4] *Cf. United States* v. *Press*, 336 F.2d 1003, 1015 (2d Cir.), *cert. denied*, 379 U.S. 965 (1964).

[5] See *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), quoting Judge Learned Hand in *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). The instruction appears at Tr. 130, 131-134.

[6] The Government adduced evidence that appellant had come to the scene of the crime in a group, that he participated in violence directed to the complainants with an inferable intent of robbery, that one complainant was robbed, that appellant left the scene with the group, and that he was found shortly thereafter with the person identified as the principal robber. See Counterstatement 2-3. Compare Appellant's Br. 10.

[7] The court prefaced the hypothetical facts as follows:

> Let me see if I can give you an example of what we mean when we say any person aids or abets or assists another person in the commission of an offense is charged as a principal and is equally guilty.
>
> This hypothetical set of facts I am about to give you is not related by any ways to this case, it is simply an example how it operates. Let us assume tomorrow morning at 10:00 o'clock . . . .
>
> (Tr. 132.)

able to a normally intelligent jury,[8] and not at all subject to the criticisms made of hypotheticals constructed out of the very facts the jury must decide.[9]

The court's instruction on assault with intent to commit robbery and the lesser included offense of simple assault was not erroneous or, if so, prejudicial. The instruction did not amount to a directed verdict of guilty of assault, as appellant contends,[10] especially in view of the fact that the trial judge earlier had fully explained to the jury the treatment of the lesser included offense.[11] Moreover, evidence of guilt on that charge was strong. See *Vauss* v. *United States*, *supra* at slip op. 4-5; *Rivera* v. *United States*, *supra* at 554; compare *Bihn* v. *United States*, 328 U.S. 633, 638 (1946); *Glasser* v. *United States*, 315 U.S. 60, 67 (1942). In the face of three witnesses testifying to the occurrence of the assault, two of whom unequivocally identified appellant as the perpetrator, appellant offered only a partial and uncorroborated alibi defense.[12] To be sure, the jury found guilt, but it is hardly sound or persuasive to argue, as appellant must, that that for the claimed omission the jury could have been mistaken

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[8] See *Vauss* v. *United States*, D.C. Cir. No. 19494, decided November 17, 1966, at slip op. 4; *Moore* v. *United States*, 120 U.S. App. D.C. 203, 204, 345 F.2d 97, 98 (1965); *Jones* v. *United States*, *supra* at 234, 307 F.2d at 191; *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 77, 284 F.2d 209, 211, *cert. denied*, 369 U.S. 863 (1960).

[9] Compare *Battle* v. *United States*, 120 U.S. App. D.C. 221, 223, 345 F.2d 438, 440 (1965); *Hardy* v. *United States*, 118 U.S. App. D.C. 253, 255, 335 F.2d 288, 290 (1964).

[10] See Appellant's Br. 11.

[11] In the course of explaining the elements of the second count of the indictment, the court said:

> If you are not satisfiend [sic] beyond a reasonable doubt that the Government has proved all of the elements I indicated, or enumerated, as far as the second count is concerned, you may consider *whether or not* the defendant, under that count, is guilty of what is known as a lesser included offense known as simple assault . . . . (Tr. 128.) (Emphasis added.)

[12] See Counterstatement 2-3, for references to transcript.

on so fundamental an aspect of their role in the case. *Cf. Jones* v. *United States, supra* at 234, 307 F.2d at 191. Appellant in asking reversal asks an extravagant protection for a matter apparently disregarded by his trial attorney and from which it is unwarranted charity to conclude any prejudice could possibly have resulted. *Cf. Namet* v. *United States*, 373 U.S. 179, 190 (1963).

Appellant finally discovers error in the trial court's reference to the interest of the United States in the prosecution.[13] The court did not say "conviction" but "prosecution," and it coupled the statement with an exposition of the right of every criminal defendant to a fair and impartial trial by jury (Tr. 117-118). We see no impropriety in the court's statement.[14] Perhaps the fact that appellant in the body of his argument devotes barely a sentence to it is an indication that he also considers the contention a makeweight.

In sum, we would urge in the words of this Court that the "power vested under [the plain error] rule is one to be exercised to prevent miscarriage of justice." *McAbee* v. *United States*, 111 U.S. App. D.C. 74, 77, 294 F.2d 703, 706 (1961). Substantial rights are unaffected here. *Cf. Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946). This is a case where confusion and misapprehension are discovered in the cold record on appeal although they were not present in the trial courtroom, where the sport of snytax is indulged in the place of substance. *Cf. McGill & Hinton* v. *United States*, 121 U.S. App. D.C. 179, 185, 348 F.2d 791, 797 (1965).

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[13] Appellant's Br. 13. Appellant apparently overlooks the court's later reference to the interest of the United States in having the jury "judge this case fairly, honestly, impartially, and objectively." Tr. 139.

[14] Compare *Scurry* v. *United States*, 120 U.S. App. D.C. 374, 376, 347 F.2d 468, 470 (1965), where the Court declined to notice this aspect of a similar statement by the trial judge.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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